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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 585

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

NATIONAL BROADCASTING COMPANY, INC. (KOA)

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION

OPINION BELOW

The opinions in the United States Court of Appeals for the District of Columbia (R. 183–213) have not yet been reported.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered on September 12, 1942 (R. 215). The petition for a writ of certiorari was filed on December 12, 1942, and was granted on January 18, 1943. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Respondent is licensed to operate Station KOA at Denver, Colorado, on the frequency 850 kilocycles; Station WHDH, at Boston, Massachusetts, was licensed on the same frequency for daytime operation. After a public hearing the Commission granted an application of WHDH for a construction permit to authorize the installation of equipment leading to a modification of the WHDH license to permit operation with increased power and without limitation of time. While the WHDH application was under consideration, KOA filed two petitions to intervene, on the ground that operation of WHDH as proposed would result in interference with the reception of KOA and therefore a "substantial modification" of respondent's station license would result. Each of these petitions was denied by the Commission. KOA was, however, permitted to participate as *amicus curiae* in the proceedings before the Commission and to file briefs and argue orally before the proposed decision was made final, and to file a petition for rehearing.

The questions presented are:[1]

1. Did the granting of the WHDH application constitute a substantial modification of the license of KOA or otherwise affect KOA's rights as a licensee so as to require under the Communica-

[1] The only ground taken in any of the opinions below concluding that the Commission's decision was invalid, is that respondent had been improperly denied the right to intervene.

tions Act that KOA be permitted to intervene in the proceedings on the WHDH application before the Commission could lawfully grant that application?

2. If so, was KOA denied any substantial right of participation in the proceedings on the WHDH application?

STATUTE INVOLVED

The pertinent sections of Title III of the Communications Act of 1934, c. 652, 48 Stat. 1064 (hereinafter referred to as the "Communications Act") are printed in the Appendix, *infra*, pp. 56–63. The pertinent Regulations are printed at pp. 63–67.

STATEMENT

National Broadcasting Company, Inc., licensee of Station KOA, Denver, Colorado (hereinafter referred to as "KOA"), commenced this action by filing on June 7, 1941, in the court below, a "Notice of Appeal and Statement of Reasons Therefor", as provided for by Section 402 (b) 2 of the Communications Act. The action was directed against an order of the Federal Communications Commission (hereinafter referred to as "Commission"), granting an application of Matheson Radio Company, Inc., Boston, Massachusetts, (hereinafter referred to as "WHDH"), for increased power and increased hours of operation. The court below reversed the Commission, and upon petition of the Commission this Court granted certiorari.

KOA is a radio broadcasting station which operates on the frequency 850 kilocycles, unlimited time, with power of 50 kilowatts. WHDH, prior to October 25, 1938, operated in Boston, Massachusetts, on the same frequency as KOA,[2] with power of 1 kilowatt until sunset at Denver, Colorado (R. 1–2). Under the Commission's Rules (Sections 3.22 and 3.25)[3] the frequency on which KOA and WHDH operated was classified as I-A channel—one on which only one station is permitted to operate nighttime.[4]

On October 25, 1938, WHDH filed an application with the Commission requesting an increase in power from 1 kilowatt to 5 kilowatts and authority to operate unlimited time (R. 97–104).

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[2] Before March 29, 1941, both KOA and WHDH operated on the frequency 830 kilocycles. On that date they were shifted to 850 kilocycles in connection with a general shift of frequencies made in accordance with the provisions of the North American Regional Broadcasting Agreement (R. 64, n, 1).

[3] The relevant portions of the Commission's Rules and Regulations are set out in the appendix, *infra*, pp. 63–67.

[4] Under the Commission's Rules and Regulations (Sec. 3.21), there are three classes of standard broadcast channels. The first type—the one involved in this case—is a clear channel on which stations render service over wide areas. The maximum power for such stations is 50 kilowatts. On some clear channels only one station is permitted to operate nighttime—the so-called I-A channels. On other clear channels—I-B—more than one station is permitted to operate nighttime.

The second type of channel is the regional channel on which several stations may operate with power not in excess of 5 kilowatts. The third type of channel is the local channel on which many stations may operate with power not in excess of 250 watts.

Upon examination of the WHDH application, the Commission was unable to find that public interest, convenience, or necessity would be served by granting it; and consequently designated the application for hearing. On September 2, 1939, the Commission designated the following issues for the hearing (R. 11–12):

> 1. To determine whether the interests of any other stations may be adversely affected by reason of interference, particularly stations KOA, WRUF, WEEU, and WABC;
>
> 2. [An issue relating to an application from a Florida station which was subsequently withdrawn and is not material here.]
>
> 3. To determine whether public interest, convenience or necessity would be served by modifying the Rules governing standard broadcast stations, particularly Sections 3.22 and 3.25 (Part 3), to authorize the operation of WHDH as proposed;
>
> 4. To determine whether station WHDH, operating as proposed on 830 kc, with 5 kw power would render the type of service for which said frequency is designed under the Commission's plan of allocation and Standards of Good Engineering Practice.

On September 23, 1939, KOA filed a petition to intervene in the proceedings before the Commission (R. 13). That petition, omitting the formal allegation, reads as follows:

> 1. Petitioner operates station KOA at Denver, Colorado, on 830 kc with power of 50 kw. unlimited time.

2. The operation of station WHDH at Boston, Mass., as proposed will cause interference to station KOA in areas where KOA's signal is now interference free.

3. Petitioner would be aggrieved and its interests adversely affected should WHDH be authorized to operate as proposed.

4. The operation of WHDH as proposed would not be in the public interest, convenience, and necessity.

The petition was denied by the Motions Commissioner on the ground that it did not comply with the Commission's rule on intervention[5] (R. 13). The Commissioner rested his decision on grounds stated in a written opinion entered the same day, *In re Application of Hazelwood,* 7 F. C. C. 443 (1939) (R. 14–20). The action of the Motions Commissioner was affirmed by the Commission *en banc* on October 10, 1939, when it dismissed KOA's petition for review filed on October 4, 1939 (R. 24).

On December 2, 1939, the Commission issued a second Notice of Hearing to replace that issued on September 2, 1939, containing the following issues (R. 25–26):

1. To determine whether or not the Commission's Rules Governing Standard Broadcast Stations, particularly Sections 3.22 and 3.25 (Part III) properly interpreted and

[5] Rule 1.102 governing intervention is set forth *infra*, p. 63.

applied preclude the granting of the application;

2. To determine the nature, extent and effect of any interference which would result should the applicant's proposed station operate simultaneously with stations KOA, WRUF, WEEU, and WABC;

3. [An issue relating to the Florida application not material here].

On January 29 and 30, 1940, a hearing was held before an Examiner of the Commission in which the applicant and station WEEU, which had been permitted to intervene, participated (R. 28). WEEU operates at Reading, Pennsylvania, on the same frequency as the applicant. Testimony was given by witnesses for the applicant and by a member of the Commission's engineering staff.

On December 9, 1940, the Commission (with two Commissioners dissenting) issued its Proposed Findings of Fact and Conclusions proposing to grant the WHDH application (R. 27–46). The Commission found that operation of Station WHDH as proposed would not cause interference to the primary service of any station, and any interference which might be expected to KOA would be limited "to interference with intermittent reception upon receivers located in the eastern part of the United States, remote from the station" (R. 32). The Commission concluded that the

grant of the application would be in the public interest and that Section 3.25 of the Rules should be amended so as to change the frequency 850 kilocycles from a I–A frequency to a I–B frequency—that is, a frequency upon which duplicate nighttime operation is permissible (R. 31–32).

On December 16, 1940, KOA filed a second petition to intervene (R. 46–49). In this petition KOA alleged *inter alia* that the majority findings, if adopted by the Commission, would:

> (a) Result in interference to Station KOA in areas where KOA's signals are now interference free.
>
> (b) Result in a modification of Petitioner's license * * * contrary to Section 312 (b) of the Communications Act of 1934.
>
> (c) Result in a modification of the Commission's Regulations * * * contrary to Section 303 (f) of the Communications Act.

The petition did not dispute the accuracy of the evidence offered at the hearing or of the Commission's Findings and Conclusions that the operation of WHDH nighttime would not cause objectionable interference in the effective service area of KOA in the western part of the United States; nor did it show any intention on the part of KOA to offer any evidence material to a determination of the WHDH application which had not already been considered by the Commission. This petition to intervene was denied by the Com-

mission on January 7, 1941 (R. 50). KOA was, however, permitted to file a brief and participate as *amicus curiae* in the oral argument before the Commission (R. 50, 69).

At any stage of the proceeding, despite the fact that it had not been permitted to intervene because of failure to meet the requirements of the Commission's Rule on intervention, KOA could have taken advantage of the provisions of Commission's Rule 1.195[4] in order to bring any facts before the Commission which it thought relevant to proper determination of the questions raised by the WHDH application. KOA did not attempt to take advantage of the provisions of that section of the Commission's Rules.

On March 26, 1941, the Commission (with two Commissioners dissenting) entered its Final Order adopting the proposed findings and amending the Rules and Regulations by transferring the frequency 850 kilocycles from subsection (a) of Section 3.25 to subsection (b) of Section 3.25 (R. 50–52).

On April 25, 1941, KOA filed a petition for rehearing (R. 52–63) going to the merits of the order; the petition was fully considered by the

[4] "§ 1.195. Communications relating to applications.— * * * No such person shall be precluded from giving any relevant material and competent testimony at such hearing because he lacks a sufficient interest to justify his intervention as a party in the matter. * * *." The rule is set forth in full, *infra*, p. 64.

Commission, and a further comprehensive opinion was rendered discussing KOA's objections *seriatim*. The order was reaffirmed and the petition for rehearing denied on May 20, 1941 (R. 63–85). On June 7, 1941, KOA filed in the court below a Notice of Appeal and Statement of Reasons Therefor (R. 1–10).

The cause was argued before the court below on January 6, 1942. The court which heard this argument was composed of Chief Justice Groner and Justices Miller and Edgerton. On June 13, 1942, the court on its own motion set the cause for reargument before all six judges of that court. On September 12, 1942, the court handed down five opinions and entered judgment reversing and remanding the cause for further proceedings in conformity with the "opinion of this Court." The basis of the action of the court below was the failure of the Commission to permit KOA to participate as a party to the proceedings before it.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In failing to dismiss the appeal.

2. In holding that respondent had a right to intervene in the proceedings before the Commission on the WHDH application, and that the denial thereof gave it standing to appeal or furnished a basis for reversing the Commission's action.

3. In holding that respondent was in fact denied a substantial right of participation in the proceedings.

4. In failing to affirm the Commission's order.

SUMMARY OF ARGUMENT

I

Respondent had no right to intervene as a party in the proceedings on the application of station WHDH. The Communications Act contains no provisions with respect to intervention but provides that the Commission shall "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice." Section 4 (j). The Commission's rule on intervention requires that the petition must set forth the grounds of the proposed intervention, the interest of the petitioner, and the facts on which the intervention is claimed to be in the public interest. This provision is a reasonable one. Under the older practice, whereby intervention was granted to persons having some interest in the proceedings, parties became numerous, hearings protracted, and records voluminous. The interest of the public in having new facilities licensed was thwarted. The variety and number of interests which in some manner may be affected by the grant of applications make it appropriate that intervention be limited to instances where the Commission will be aided in applying the statutory standards. In fact, under the present rule petitions for inter-

vention have been granted in more than half the cases where they were filed, and only about one-fifth have been denied outright.

Respondent's petitions failed to comply with the Commission's rule, taking the position that it was entitled to intervene as a matter of right. It did not, moreover, seek to introduce evidence, as one not a party by intervention may do under the Commission's rules.

Provisions of the statute relied on by respondent do not support its position. Section 303 (f) requires a hearing to be afforded a station licensee before a regulation is adopted which changes the frequency, authorized power, or times of operation of its station. The order granting the WHDH application makes no change whatever with respect to the operation of respondent. Similarly, Section 312 (b) requires an opportunity to show cause before an order of revocation or modification of a station license is made final. No such action with respect to the respondent is involved here. Its license is not modified; a license is carefully restricted in scope by Sections 304 and 309 (b) (1) of the statute, and simply gives the licensee authority to operate on the terms prescribed. The license does not confer any right to claim a given area as one in which the licensee's signals must be kept free of interference.

No constitutional considerations require that respondent be permitted to intervene. The action

of the Commission does not interfere with any of respondent's legal rights. Apart from statute there is no right to be free of increased competition and no right to be made a party before such competition is authorized. At best respondent's position is essentially no different from that of a newspaper or advertising agency whose revenues may be affected by the grant or extension of a license to an applicant.

II

The participation of respondent was in fact adequate and appropriate to its interest. It was permitted to file a brief and make oral argument after the entry of proposed findings and conclusions of the Commission; and its petition for rehearing after these were made final was fully considered by the Commission. The issues involved in the proceedings were essentially one of judgment with respect to the application of a rule of the Commission regarding exclusive nighttime operation, in the circumstances here disclosed, and one of expert engineering advice regarding the existence and extent of interference which might result. On the issue of administrative judgment, respondent's presentation of its views through brief and oral argument and petition for a rehearing was adequate and appropriate. On the issue of engineering advice, the Commission was entitled to rely primarily on the evidence of

its expert. Moreover, the findings show that the interest of respondent is remote, since the operation of WHDH as proposed will not interfere with respondent's area of satisfactory service, but will be limited to interference with intermittent reception in the eastern part of the United States remote from respondent's station. Respondent did not attack the accuracy of these findings.

III

The interest of respondent is too remote to give it standing to appeal under Section 402 (b) (2). Unless a more concrete showing of financial detriment is required, respondent's standing to appeal would raise serious constitutional difficulties for want of a case or controversy.

If the Court should nevertheless regard respondent's interest as adequate under the decision in the *Sanders Brothers* case, 309 U. S. 470, we suggest that the meaning of Section 402 (b) (2) be examined in the light of recent decisions of this Court. It is believed that, when so examined, the section will be found to authorize appeal only by those whose legal interests are sought to be vindicated. Such interests might be possessed, for example, by persons having contractual relations which are invaded by an order of the Commission granting a license to an applicant. Cf. *Columbia Broadcasting System* v. *United States*, 316 U. S. 407. Furthermore, the history of the section

indicates that its real purpose was to allocate review of the Commission's orders between district courts and the Court of Appeals, and not to confer additional legal protection to persons who would lack standing to bring suit under the Urgent Deficiencies Act. The construction we suggest avoids the incongruity of making an appealable interest turn on whether the suit arises out of proceedings begun before the Commission by an applicant or licensee on the one hand, or by the Commission on its own motion on the other; it is this distinction which determines whether review is to be had under the Urgent Deficiencies Act or in the Court of Appeals under Section 402 (b) (2).

ARGUMENT

I

RESPONDENT HAD NO RIGHT TO INTERVENE ON THE WHDH APPLICATION

1. THE CONTROLLING STATUTORY PROVISIONS AND THE COMMISSION'S REGULATIONS

Respondent filed two petitions to intervene in the hearing on the WHDH application. The first was filed September 23, 1939, before the hearing was held, and the second was filed December 16, 1940, after the conclusion of the hearing and after the Commission had issued its Proposed Findings of Fact and Conclusions (R. 13, 46). Both petitions were denied by the Commission because they

were not in compliance with its rule on intervention (R. 13, 50).

The Communications Act contains no mandatory provision with respect to intervention in hearings. See *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 138. The determination whether to permit or to deny intervention is committed to the Commission's discretion by Section 4 (j), which provides that the Commission shall "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice." In pursuance of this provision the Commission has adopted Rule 1.102, relating to intervention by interested parties. Rule 1.102 reads as follows:

> § 1.102. *Intervention.*—Petitions for intervention must set forth the grounds of the proposed intervention, the position and interest of the petitioner in the proceeding, the facts on which the petitioner bases his claim that his intervention will be in the public interest, and must be subscribed or verified in accordance with section 1.122. The granting of a petition to intervene shall have the effect of permitting intervention before the Commission but shall not be considered as any recognition of any legal or equitable right or interest in the proceeding. The granting of such petition shall not have the effect of changing or enlarging the issues which shall be those

> specified in the Commission's notice of hearing unless on motion the Commission shall amend the same.

The reasonableness of this provision should be considered in the light of the provisions of the Communications Act relating to the duty of the Commission to hold hearings, the nature of radio broadcasting, and the Commission's experience under its old procedure, wherein intervention was virtually automatic.

Section 309 (a) of the Communications Act provides:

> If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the Commission upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe.

This section was formerly Section 11 of the Radio Act of 1927, and was brought over verbatim into the Communications Act. The House Managers in charge of H. R. 9971, 69th Cong.,

which became the Radio Act of 1927, explained the purpose of Section 11 as follows:[7]

> Section 11 authorizes the licensing authority * * * *to issue licenses upon examination of the application* if it determines that public interest, convenience, or necessity would be served by the granting thereof. It provides, however, that in the event the licensing authority upon examination of an application does *not* reach such decision with respect thereto, it shall *then* notify the applicant and fix and give notice of the time and place of hearing on the application. [Italics supplied.]

Thus, Section 309 (a) not only does not prohibit the Commission from granting applications without a hearing, but taken together with Section 307 (a) makes it mandatory for the Commission to do so if it can determine from the application that public interest, convenience, or necessity would be served by a grant thereof. Thereby Congress sought to promote the full utilization of radio facilities in the public interest by having them assigned as promptly as possible while at the same time affording to *applicants* the maximum protection against unwarranted *denials* of licenses to operate radio equipment by requiring that notice and opportunity to be heard be given to the applicant before its

[7] 68 Cong. Rec. 2563. The statement of the Senate Managers on Section 11 is identical with that of the House Managers. See 68 Cong. Rec. 2589.

application may be denied. No such right of notice and hearing is conferred in any event upon any person other than the applicant.

Under the older procedure the Commission permitted any person to intervene if his petition disclosed an interest in the subject matter. This system, however, proved impracticable, as pointed out by the Commission in its decision in *In re Application of Hazelwood, Inc.* (Docket 5698 (R. 14–20)):

> Under its former rule, the Commission permitted any person to intervene in a hearing if his petition disclosed "a substantial interest in the subject matter." This standard was so broad and the Commission's practice under it was so loose that intervention in Commission hearings came to be almost a matter lying in the exclusive discretion of persons seeking to become parties to Commission proceedings. The experience of the Commission during the past few years clearly demonstrated that the participation of parties other than the applicant in broadcast proceedings in a great many cases resulted in unnecessarily long delays and expense to both the Commission and applicants without any compensating public benefit. In many cases the major function served by intervenors was to impede the progress of the hearing, increase the size of the record, confuse the issues and pile up costs to the applicant and to the Commission through the intro-

duction of cumulative evidence, unnecessary cross-examination, dilatory motions, requests for oral argument and other devices designed to prevent expeditious disposal of Commission business (R. 16).

The Commission found that intervention under the old rule became virtually a matter of discretion with proposed intervenors, with the result that parties became numerous, hearings protracted, and records voluminous. Effective dispatch of the Commission's business was impossible, and the interest of the public and of applicants in having new facilities licensed was effectively thwarted.

It thus became apparent that interest alone was an insufficient test for intervention. Because of the nature of radio broadcasting, virtually every application for a new station or increased facilities involves many persons who claim to be interested. Such applications are commonly for facilities in a community which already has one or more stations which may be fearful of the competition which the operation of the proposed station might entail, or are for facilities which cause some degree of electrical interference to existing stations operating on the same or adjacent frequencies. In many situations both factors combine to increase the number of potentially interested persons. The situation is aggravated by the fact that in practically every instance the persons who claim interest in the proceedings are existing

licensees whose private interests are promoted by protracted proceedings which delay as long as possible the establishment of competing facilities.[8]

It was to remedy this situation that the present rule governing intervention, quoted above, was adopted. Under this rule the petition must show not only the interest of the proposed intervenor but also how his participation in the hearing will be of assistance to the Commission in determining the issues before it. This rule was not adopted, as respondent has suggested, for the convenience of the Commission but rather because the Com-

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[8] "* * * More often than not the intervenors presented no affirmative evidence on the issues at hand. The major functions served by them were apparently to impede the progress of the hearing, to increase the size of the record, and to obfuscate the issues by prolonged and confusing cross-examination. Nor were these dilatory and destructive tactics restricted to the hearing itself. Each intervener would customarily avail himself of his rights to take exceptions to the examiner's report, to oral argument before the Commission, and, in many cases, to appeal from the Commission's order to the District of Columbia Court of Appeals.*

"The deplorable consequences of the Commission's 'liberal' intervention policy became so apparent that the Commission recently came to grips with the problem."

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*"The purpose of the intervener's dilatory tactics was, in many cases, to frustrate the licensing and operation of a competing station for as long a period as possible. It was believed that the cost of maintaining proceedings before the Commission and the courts could easily be covered by the continued revenues from sponsors who might be lost if a competing station were in existence." *Administrative Procedure in Government Agencies*, Monograph No. 3, S. Doc. 186, 77th Cong., 3d sess., pp. 16–17.

mission's experience showed that the rights of applicants for new stations and the interest of the public in the maximum utilization of radio facilities were jeopardized by a procedure permitting unlimited intervention. Opportunities for delay and protracted proceedings, which the old procedure invited, made impossible an efficient administration of the Act and retarded the maximum utilization of radio facilities—primary objectives sought to be achieved by the Communications Act. Rule 1.102 has aided the Commission in attaining these objectives by permitting intervention only in those cases where it will be of assistance in determining the matters in issue.[9] This result has not been achieved at the expense of persons with a substantial interest in proceedings, for the Commission has been liberal in applying its intervention rule. Compliance is not difficult, as is evident from the high percentage of cases in which the Commission has permitted in-

[9] "In general, it may be said that denials and dismissals of petitions to intervene have been based upon the fact that the proposed intervener desired only to show at the hearing the manner in which his private interests would be affected by a grant of the application, and in many instances the proposed intervener did not indicate that he was prepared to show even this much. Such petitions have failed to address themselves to any consideration of public interest or to facts which would constitute valid grounds for denial of the application in which participation was sought by the objecting person." Hearings before Subcommittee of the Committee on the Judiciary, on S. 674, S. 675, and S. 918, 77th Cong., 1st sess., pp. 1558–1559 (Statement of the Commission).

tervention. As of June 1942, 217 petitions for intervention had been filed under the new rule; of these, 124 were granted, 37 dismissed without prejudice, 12 withdrawn, and 44 denied. See Hearings on H. R. 5497, 77th Congress, 2d Session, before House Committee on Interstate and Foreign Commerce, p. 782. Thus in more than half the cases the petitions were granted, and in ~~less than~~ only a fifth were they denied absolutely.

Respondent's petitions to intervene failed to comply with the requirements of the Commission's rule on intervention, and made no attempt to comply, contending that the Commission had no authority to make such requirements.[10] Its first petition to intervene, filed on September 23, 1939, contained but 11 or 12 lines, and omitting its formal provisions read as follows (R. 13):

> 1. Petitioner operates station KOA at Denver, Colorado on 830 kc with power of 50 kw unlimited time.
>
> 2. The operation of station WHDH at Boston, Mass., as proposed will cause interference to station KOA in areas where KOA's signal is now interference free.
>
> 3. Petitioner would be aggrieved and its interests adversely affected should WHDH be authorized to operate as proposed.
>
> 4. The operation of WHDH as proposed would not be in the public interest, convenience and necessity.

[10] See Petition for Review, R. 23.

No attempt was made in the petition to allege or show the extent of interference which would be caused to Station KOA as a result of the operation of WHDH on the same frequency, or how the intervention of KOA would in any way assist the Commission in the determination of the issues at the hearing. Petitioner predicated its case on its status as the licensee of a dominant station on a clear channel on which the applicant was requesting authority to operate unlimited time. Accordingly, the Commission, on September 29, 1939, denied the petition to intervene (R. 13).[11]

The same observation may be made with respect to respondent's second petition to intervene, filed December 16, 1940, after the Commission had issued its Proposed Findings of Fact and Conclusions. In this petition respondent alleged that it was the licensee of KOA at Denver, Colorado, a dominant clear-channel station, and that the Commission, by its Proposed Findings of Fact and Conclusions, had indicated that it would permit Station WHDH to operate unlimited time on that frequency. Respondent requested that it be permitted to intervene in order that, as a party, it could (R. 49):

> 1. Renew its Motion to Dismiss the WHDH application.

[11] The order denying the petition to intervene referred to the Commission's decision in a case decided the same day. *In re Application of Hazelwood, Inc.* (Docket No. 5698), quoted, *supra*, p. 19.

2. File a Motion to Reopen the proceeding in order to afford Petitioner an opportunity to introduce evidence to cross examine all witnesses and otherwise to participate fully in the proceedings.

3. Upon such record file proposed Findings of Fact and Conclusions of Law. .

4. Have the right to file Exceptions to any proposed Commission decision thereafter issued.

5. Request Oral Argument upon such proposed decision and upon its Exceptions thereto.

6. In all respects participate fully in the important issues involved in the application of Matheson Radio Company, Inc.

This petition, it should be noted, did not in any way suggest that any of the proposed findings of fact issued by the Commission were erroneous, and, like the first petition, did not even allege that respondent had any evidence to introduce; nor did it contain any showing as to what it intended to prove by participating in the hearing. Accordingly, the second petition was likewise denied, but respondent was given an opportunity to file a brief with the Commission and to appear before the Commission *en banc* and argue orally why the Commission's proposed decision should not be made final. Respondent availed itself of this opportunity.

It should also be remembered that respondent did not seek to present evidence, short of partici-

pation as a party through intervention, pursuant to the Commission's Rule 1.195, *infra*, p. 64. This rule must be considered in appraising the reasonableness of the rule on intervention.

We submit, in short, that under the controlling statutory provisions and under regulations of the Commission which are entirely reasonable and appropriate, the respondent's petitions for intervention were properly denied.

2. OTHER PROVISIONS OF THE STATUTE

The opinions below discuss, and respondent has placed reliance on, Sections 303 (f) and 312 (b) of the Act. It is our position that these provisions do not support the claim of KOA that it has a right to intervene, and that in fact the existence of such a right is negatived by these provisions and the scheme of the Act as a whole.

That such a right does not exist under the statute is shown by Section 309 (a), *infra*, p. 60, which prescribes the procedure which the Commission must follow in acting on an application for a license or renewal or modification. As pointed out, *supra*, p. 18, the Commission must grant the application forthwith if it is able to determine from an examination of the application that a grant of it will serve public interest, convenience, or necessity. If it cannot so determine, the Commission must notify the applicant and afford it an opportunity to be heard under rules and regulations prescribed by the Commission. The omission of any pro-

vision for the right of an interested person to be heard is significant, particularly in view of the statutory provisions about to be considered which make specific provision for hearings in well-defined classes of cases. Moreover, in giving an opportunity for "rehearing" in Section 405, the Act provides that application therefor may be made "by any party or any person aggrieved or whose interests are adversely affected thereby." If KOA's claim were based on its being a person of the character described, its right would not be one of intervention but at most a right to seek a "rehearing." For this purpose it is immaterial whether the application has been granted with or without a hearing. The concept of "rehearing" is broad enough, as the administrative practice recognizes, to enable a person not theretofore a party to a hearing to file a petition under Section 405. This was in fact the procedure followed in *Scripps Howard Radio, Inc.* v. *Federal Communications Commission*, 316 U. S. 4, as the opinion in that case discloses.[12] A petition for rehearing is necessary to exhaust administrative remedies under the Act, with respect to persons not theretofore parties. *Red River Broadcasting Co.* v. *Federal Communications Commission*, 98 F. (2d) 282 (App. D. C.), certiorari denied, 305 U. S. 625.

[12] Other cases in the Court of Appeals in which such petitions for rehearing were filed and appeals subsequently taken are: *Palmer* v. *Federal Communications Commission*, No. 7542; *Brown Radio Service* v. *Federal Communications*

terms or to modify the operating requirements or conditions of the license. For example, if the Commission by order proposed to revoke the license of KOA or to require it to operate with 5 or 500 kilowatts instead of 50 kilowatts power, KOA would have a right to be heard or to show cause before the Commission could make its order final.

Since the operation of a station in a manner not in accordance with its license is a criminal offense under the statute (Sections 301, 501), Section 312 provides for an opportunity to show cause where the terms of the license are proposed to be modified. In the present case the order of the Commission granting WHDH the authority which it has requested with respect to its transmitter at Boston does not require KOA to make any change whatever in its operation. Continuation of its present operations will subject it to no penalty.

The argument of KOA is in substance that Congress intended by Section 312 (b) to provide for a hearing to a licensee before any order could be entered which either directly or indirectly might result in a curtailment of the area in which the signals of the station could be satisfactorily received. This argument misconceives the provisions of Section 312 (b). The right protected by that section is the right to operate under the terms of a license as granted, not a supposed right that a station shall have its signals received throughout a given service area during the term

of the license. It is significant that Section 303 (h), *infra*, p. 58, provides that the Commission shall have authority to establish areas or zones to be served by any station, but does not provide that any licensee shall have a right to be heard before the area or zone to be served by his station shall be established or defined by the Commission. In view of the fact that in Section 303 (f) the Commission's power to make regulations without affording hearings to affected licensees is specifically restricted if the regulation changes the power, frequency or times of operation of a station, it is hardly likely that Congress in Section 303 (h) would not have included a similar provision for hearing had its considered a licensee entitled as of right to have its signals received without interference throughout any given area or at any particular point.

The assumption by KOA that the Commission is effecting a modification of its license by the grant to WHDH rests on an untenable view of the license. The license authorizes KOA to operate a transmitter of 50 kilowatts on the frequency 850 kilocycles at Denver. Without the license it would be a criminal offense for KOA to operate this transmitter. There is nothing in the license which guarantees KOA against operation by others of electrical equipment for the purpose of transmitting radio signals or for some other purpose, though the result of such operation is to

interfere with reception of KOA's signals at some point. Licenses under the Act are carefully restricted in their scope. Section 309 (b) (1), *infra*, p. 60, provides that "The station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized therein." Section 304, *infra*, p. 58, provides that "No station license shall be granted by the Commission until the applicant therefor shall have signed a waiver of any claim to the use of any particular frequency or of the ether as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise." This provision, taken over from the Radio Act of 1927, had been embodied in an act of December 8, 1926, c. 1, 44 Stat. 917, and thus has represented consistent congressional policy.

The troublesome problem of interference from other transmitters has been committed to the Commission. Congress carefully avoided giving any semblance of right to existing stations to restrict or prevent the operation of other stations in order to permit satisfactory reception of signals. The problem is one to be dealt with by the Commission under the Act in the public interest, and not as a matter of private right. Section 307 (b) of the Act provides that the Commission, in considering applications for licenses, when and inso-

far as there is a demand for the same, "shall make such distribution of licenses, frequencies, hours of operation and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." It is clear from a reading of this section that no private rights are intended to be created or recognized thereby. *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U. S. 470. The duty imposed upon the Commission to provide a fair and equitable distribution of radio service was not embodied in the statute to protect the interest of those who sought or enjoyed licenses, but rather to insure the general public of the widest possible benefits from radio.

This outline of congressional policy with respect to licenses makes it plain, we submit, that it would be unwarranted to regard the order granting the application of WHDH as a modification of KOA's license even if the Court were at liberty to construe Section 312 (b) as dealing with anything more than a modification of the terms of the license itself.

3. CONSIDERATIONS OF DUE PROCESS

Respondent may not place its claim to intervention on a constitutional ground. If the statute does not contemplate intervention as a matter of right, the respondent, which has accepted the benefit of a license under the statute, is not in a position to attack its procedural provisions. Cf.

Great Falls Manufacturing Company v. *Attorney General*, 124 U. S. 581; *Wall* v. *Parrott Silver & Copper Co.*, 244 U. S. 407, 411–412; *Atlantic Refining Company* v. *Virginia*, 302 U. S. 22, 32–33.

Apart from this factor, however, the respondent has no legally protected interest which requires that it be made a party on the application of Station WHDH. We have already discussed the limited scope of the license under the statute. See pp. 31–32, *supra*. The license is not a contract with the Government giving protection against competition or electrical interference. The license is not a franchise such as was dealt with in *Frost* v. *Corporation Commission*, 278 U. S. 515, whereby those engaged in certain businesses are subject to regulations designed to take the place of competition and are entitled to complain of competition which is unauthorized. The distinction between a license under the Communications Act and a franchise granted to common carriers was emphasized by this Court in *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U. S. 470, 474–475. There the Court said:

> In contradistinction to communication by telephone and telegraph, which the Communications Act recognizes as a common carrier activity and regulates accordingly in analogy to the regulation of rail and other carriers by the Interstate Commerce Commission, the Act recognizes that broadcasters are not common carriers and are not to be dealt with as such. Thus the

Act recognizes that the field of broadcasting is one of free competition. The sections dealing with broadcasting demonstrate that Congress has not, in its regulatory scheme, abandoned the principle of free competition, as it has done in the case of railroads, in respect of which regulation involves the suppression of wasteful practices due to competition, the regulation of rates and charges, and other measures which are unnecessary if free competition is to be permitted.

An important element of public interest and convenience affecting the issue of a license is the ability of the licensee to render the best practicable service to the community reached by his broadcasts. That such ability may be assured the Act contemplates inquiry by the Commission, *inter alia,* into an applicant's financial qualifications to operate the proposed station.

But the Act does not essay to regulate the business of the licensee. The Commission is given no supervisory control of the programs, of business management or of policy. In short, the broadcasting field is open to anyone, provided there be an available frequency over which he can broadcast without interference to others, if he shows his competency, the adequacy of his equipment, and financial ability to make good use of the assigned channel.

The policy of the Act is clear that no person is to have anything in the nature of a property right as a result of the

granting of a license. Licenses are limited to a maximum of three years' duration, may be revoked, and need not be renewed. Thus the channels presently occupied remain free for a new assignment to another licensee in the interest of the listening public.

Therefore, except as the statute itself may confer a right to be heard, a licensee is not injured in a legal sense by the operation of another station. Respondent would have no standing, unless conferred by the statute, to challenge the operation of a competing station; any loss to it would be *damnum absque injuria*. *Alabama Power Company* v. *Ickes*, 302 U. S. 464; *Sprunt & Son* v. *United States*, 281 U. S. 249; cf. *City of Atlanta* v. *Ickes*, 308 U. S. 517.

Action of an administrative character may have repercussions in various directions and on many kinds of interests. The extent of these has never been regarded as the measure of the obligation to grant intervention. Thus, for example, an order of the National Labor Relations Board requiring the reinstatement of discharged employees may carry with it the necessity of supplanting subsequent employees to make room for those to be rehired. *National Labor Relations Board* v. *Mackay Radio Company*, 304 U. S. 333. Yet the Board is not obliged to treat as parties all those subsequent employees whose jobs are placed in jeopardy in the proceedings. *National Labor Relations Board* v. *Star Publishing Company*, 97 F.

(2d) 465 (C. C. A. 9). Though the two classes of employees are in a real sense competitors for the jobs, the economic impact of a potential order is not enough to give the aggrieved group standing as parties. Indeed, even where a contractual relationship is threatened by Board action, as in the case of a complaint alleging that contracts with employees are in violation of the Act, there is no obligation to make the contracting employees parties. *National Licorice Company* v. *National Labor Relations Board,* 309 U. S. 350; see also *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board,* 313 U. S. 146, 155. In the case at bar the interest of respondent is not, as we have pointed out, founded on contract; consequently it has even less claim to the status of a party. Its legal interest, at best, is essentially no different from that of a newspaper or billboard advertising company whose revenues may be affected by the grant or extension of a license to another station. The Constitution does not confer on these the right to be made parties.

II

THE PARTICIPATION OF KOA WAS IN FACT ADEQUATE AND APPROPRIATE TO ITS INTEREST

Respondent has taken the position that it was entitled to intervene in the proceedings as a matter of right. Its petitions for intervention (R. 13, 46–49) did not contain any concrete indication of how its participation would contribute to the determina-

tion of the issues involved, nor did they suggest the character of the evidence which KOA would desire to introduce. In fact, KOA made no effort to present evidence pursuant to Rule 1.195, *infra*, p. 64. Under that rule it had the opportunity of appearing at the hearing and presenting any relevant and competent evidence which it may have had.

Respondent did, however, avail itself of the opportunity to present a brief and participate in the oral argument before the full Commission, addressing itself to the Commission's proposed findings and conclusions. Likewise, a brief and oral argument were presented on behalf of the so-called clear channel group of stations, whose interest was similar to that of respondent.

In view of the nature of the issues KOA's participation was, it is submitted, adequate and appropriate. The issues were essentially two: Whether the Commission's rules, properly applied, precluded the granting of the application; and to what extent the granting of the application would cause interference to other stations, including KOA (see notice of hearing, R. 25–26). The issues were thus one of judgment with respect to the application of a rule of the Commission in the circumstances disclosed by this licensing proceeding; and one of expert engineering advice.

So far as the question of judgment is concerned, respondent had ample opportunity to present its point of view through brief and oral argument, both

on the objections to the proposed findings and conclusions, and on the petition for rehearing which it filed and which was fully considered (R. 63–85). The argument of policy turned on the advisability of permitting additional night-time operation on a channel thereto classified as open to only one station at night; of doing so in a license proceeding and not by a comprehensive reexamination of the whole policy underlying clear channel classifications (see the concurring opinion of Chairman Fly, R. 90). The dissenting Commissioners were concerned with the effect of the order as a precedent "which may ultimately result in a discrimination against rural listeners in favor of those listeners living in metropolitan centers" (R. 44–45). The majority were satisfied that, since in this instance a grant of the application would result in more efficient use of the channel, the order was fully consistent with sound and established policy (R. 79–83). They stated: "The amendment merely affects a minor shift in one frequency within the established policy" (R. 83). On these matters respondent spoke its mind orally and in writing, and its views were carefully considered and discussed in the opinions of the Commission. It is difficult to see how formal intervention as a party would have enabled respondent to present its arguments more effectively. Even a party to the Commission's proceedings must await the proposed findings and conclusions before making its argument.

With respect to the issue of engineering advice, it is important to observe that the Commission utilized the service of an expert witness on its own staff, who was question by the trial examiner and cross-examined by counsel for the applicant and intervenor WEEU. The nature of the engineering evidence was such as to warrant a limitation on the number of parties who might participate in its presentation. The issue was not one having peculiar relation to facts within respondent's knowledge. The issue did not concern respondent's method of operation, or its ability to continue rendering service in the public interest if the application of WHDH were granted. The issue concerned standards of engineering practice which have been embodied in documentary form by the Commission. See *Standards of Good Engineering Practice Concerning Standard Broadcast Stations* (Revised to July 20, 1940), especially pages 1–21. The testimony was largely an application of those standards to the admitted facts, such as the distances involved, the authorized power of the stations, the present existence of electrical interference from stations on adjacent channels, and the directional character of the WHDH antenna. These matters resolved themselves into computations and the exercise of the Commission's judgment on the basis of the data so computed. When the Commission issued its proposed findings and conclusions, respondent had an opportunity to point

out any inaccuracy which it deemed to exist therein; but its second petition for intervention did not attack the accuracy of the findings of engineering facts.

Not only the nature of the factual issues, but also the slight interest which KOA had on the ground of electrical interference, justified the character of its participation in the proceedings. The Commission found that any interference which the operation of WHDH as granted might reasonably be expected to result to KOA would be limited to interference with intermittent reception in the eastern part of the United States, remote from the station; and that such secondary service as KOA could render in this area would be of uncertain character because of its dependence upon the characteristics of the individual receiver, the signal intensity, and the signal-to-interference ratio involved in each individual case (R. 32, 83–84). The basis of this finding requires some exposition of the measurement of electrical interference caused by the simultaneous operation of two or more stations on the same or adjacent frequencies.

Radio transmitters produce measurable electromagnetic effects in an area surrounding them. The size of the area depends upon many factors, including the power, frequency, absorption or conductivity characteristics of the area, sensitivity of the measuring devices, etc. The strength of the effect at any point is referred to as the field inten-

sity at that point and is usually expressed in units called millivolts per meter (mv/m) or microvolts per meter (uv/m).[13] A radio receiver converts such electro-magnetic effects into sound.[14]

At any given point, at any given time, there are present electro-magnetic fields in almost any frequency range which are of enough intensity to be translated into sound by a radio receiver of sufficient sensitivity. If it is desired to produce the sounds of one of those fields and exclude the sounds of the others satisfactorily to the average listener, the desired field must have an intensity or strength of approximately twenty times the intensity of the undesired fields present at the point of reception if the fields are produced by emissions on the same frequency (channel). A smaller ratio is sufficient if the fields are produced by emissions on a different frequency (channel). Unless the desired signal has the relative strength of approximately twenty times that of the undesired signal on the same channel, the sounds produced by both signals can be heard with the undesired signal creating a background noise or interference precluding the satisfactory reception to the average listener of the desired signal.

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[13] One millivolt equals one thousand microvolts.

[14] The following exposition is based upon the Commission's "Standards of Good Engineering Practice" referred to at p. 40, *supra*.

The minimum field intensity for acceptable service varies from approximately 0.1 mv/m in sparsely settled northern areas in winter, where so-called man-made noise from electrical devices as well as natural static is at a minimum, to approximately 50 mv/m in highly industrialized areas where man-made noise is high.

One radio station is considered to cause "objectionable interference" with the reception of another operating on the same channel at a given point if it produces at that point for more than 10 per cent of the time [15] a field which exceeds in intensity 5 per cent ($\frac{1}{20}$) of the field produced at the point by the desired station. From the fact that a field with an intensity of more than $\frac{1}{20}$ of intensity of another field will interfere with satisfactory reception of signals from the latter field, it is obvious that the interference or nuisance range of a station extends considerably beyond its satisfactory service or reception range.

Radio stations transmit radio frequency energy in all directions from the antenna. That portion of the energy which travels out along the earth's surface is known as the ground wave and that portion which is radiated upward is known as the skywave. In the case of standard broadcast sta-

[15] The time element in the definition of interference is included because during nighttime the field produced by the interfering station is usually a fluctating rather than a constant quantity.

tions, no reflection of consequence takes place during the daytime; consequently during the day these skywaves continue upward indefinitely and, hence, it is only the ground wave which can be received. At night, however, the skywave, instead of traveling upward indefinitely, strikes masses or layers of heavily ionized air found at night from 30 to 250 miles above the surface of the earth. This ionized air, called the ionosphere, acts as a mirror, reflecting the skywave back to the surface of the earth, so that at night listeners beyond the range of the ground wave can hear a distant station's skywave reflected back from the ionosphere.

Ground-wave service can be received both day and night. Skywave service, which can be received only at night, is called "secondary service." Reception from the ground wave is relatively constant and can be depended upon for reception day after day except in areas of low signal strength during periods of high atmospheric noise. "Primary service" is generally referred to as the ground wave service not subject to objectionable interference or objectionable fading and "intermittent service" is classified as ground wave service beginning where the primary service ends and extending out to points where the service is no longer usable.

"Secondary" or skywave service is variable both as to signal strength and as to percentage of time the signal is usable. In general, however, these

two variables are related in that as the distance from the station is increased, the signal becomes weaker and simultaneously usable for a relatively smaller percentage of time. At even extremely great distances the signals may occasionally be satisfactory for certain periods of time. Consequently there is no sharp line of demarcation within which the secondary service is satisfactory and outside of which the secondary service is unusable or unsatisfactory.

Under the Commission's plan of broadcast allocation, only Class I stations are assigned on the basis of rendering secondary service. By definition of the Standards of Good Engineering Practice, secondary service is rendered in the areas where the skywave for 50 per cent of the time has a field intensity of 500 uv/m or greater. The secondary service of a Class I–A station is considered as having this limit for determination of service in comparison with other stations.

As determined by the Standards of Good Engineering Practice, in the case of a 50-kilowatt station, such as KOA, the 500 uv/m 50%-of-the-time contour would have a radius of approximately 715 miles. At greater distances the signals are weaker and usable for a smaller portion of the time. Station WHDH operating as proposed will not cause objectionable interference to the reception of Station KOA as determined by these standards at any point within the latter's 500

uv/m 50%-of-the-time contour.[16] Thus the interest of KOA is remote.

In sum, respondent in fact was afforded a hearing appropriate to the issues and to its interest. Indeed, the prevailing opinion in the court below suggests that "the extent of participation actually allowed may have been substantially all that a party was entitled to have," though the opinion adds that the participation should have been afforded as a matter of right and not of favor (R. 205). It is difficult to ascertain how respondent was aggrieved by the difference in designation if in substance what it received and what it was entitled to were all one. The opinion of Justice Edgerton puts it this way (R. 212–213):

> Appellant was entitled to no more than a hearing reasonably adequate to protect its interests and reasonably practicable for the Commission and the public; in other words, to a fair opportunity to bring its facts and arguments to the Commission's attention. It had such a hearing—whether of right or of grace we need not inquire. * * *

[16] This area of 715-mile radius is shown on WHDH's Exhibits 24 and 28 (R. 118, 119). It will be seen that this radius is short of the line or band at which the interference ratio of WHDH to KOA becomes 1 to 20, as shown by the straight lines on the Commission's Exhibit 1 (R. 143-A; the colors and comment are not on the original exhibit).

III

THE STANDING OF RESPONDENT TO APPEAL

Two members of the court below (Justices Miller and Edgerton) were of opinion that respondent had no standing to appeal as a "person aggrieved or whose interests are adversely affected" within the meaning of Section 402 (b) (2). We submit that this view is sound, in the light of the facts already discussed concerning the extent of interference involved (pp. 45–46), and the allegations on appeal.

Describing the notice of appeal, Justice Edgerton said (R. 211):

> Appellant's notice of appeal, though it alleges "substantial modification" of its license, alleges neither substantial injury nor any facts which constitute substantial injury. It alleges nothing more injurious than "interference to KOA in areas where KOA's signal is now interference free." This allegation would be supported if it were shown that in some small area, thousands of miles from Denver, and of no actual or potential importance to appellant, a few listeners could and did at rare intervals get, without interference, a feeble signal from KOA, and that their reception of that signal would be made a little worse by WHDH's modification. I think such an allegation would not show standing to appeal. * * *

It is clear, on the authority of *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U. S. 470, that a person "aggrieved" by the grant of a license to another has no legally protected interest apart from the statutory right to appeal, and that the appellant must invoke the public interest in attacking the order. An appellant must show at least an adverse interest in fact, of a substantial and immediate kind, as distinguished from an interest merely in the principle involved or in possible future contingencies. Otherwise the provision for appeal would run afoul of the requirement of case or controversy. *Muskrat* v. *United States*, 219 U. S. 346; *Electric Bond & Share Co.* v. *Securities & Exchange Comm'n*, 303 U. S. 419, 443; *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 132; *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 240–241. Whatever may be the constitutional status of the Court of Appeals for the District of Columbia,[17] it is at least clear that in the absence of a case or controversy the proceeding could not come to this Court,[18] and it is not to be supposed that Congress intended review proceedings to be brought in the court below unless they were subject to the normal review here. Cf. *Federal Radio Comm'n* v. *Nelson Bros. Co.*, 289 U. S. 266. The requisite interest for appeal in the case of a commercial station such as respondent is presum-

[17] *O'Donoghue* v. *United States*, 289 U. S. 516.

[18] *Federal Radio Comm'n* v. *General Electric Co.*, 281 U. S. 464.

ably a showing of financial detriment. "Congress * * * may have been of opinion that one likely to be financially injured by the issue of a license would be the only person having a sufficient interest to bring to the attention of the appellate court errors of law in the action of the Commission in granting the license." *Federal Communications Commission* v. *Sanders Bros. Radio Station, supra, at* 477. Respondent made no allegation of financial damage and doubtless could not, in view of the tenuous character of the effect of WHDH's proposed operations upon KOA's area of useful service.

Insistence on a showing of substantial detriment is particularly important in view of the uncertainty which has surrounded certain expressions by this Court in the *Sanders* case, *supra*. Recently the Circuit Court of Appeals for the Second Circuit has explained the *Sanders* case as deciding that a statute may validly confer authority on private persons to represent the public interest in litigation as "so to speak, private Attorney Generals." *Associated Industries of New York State* v. *Ickes*, decided February 8, 1943. Appellants under Section 402 (b) have also been compared to "King's Proctors." *Colorado Radio Corporation* v. *Federal Communications Commission*, 118 F. (2d) 24, 27 (App. D. C.) If these analogies are pressed, the *Sanders* case will be applied beyond permissible bounds. Even in the historic *qui tam* actions, the

informer brought suit to recover a penalty on his own behalf "as well as" on behalf of the state.

If the Court should be of opinion that respondent does have sufficient financial interest to entitle it to appeal under the *Sanders* decision, we suggest that the meaning of Section 402 (b) (2) be examined in the light of recent decisions in which this Court has had occasion to deal with the review provisions of the Act. The conclusion in the *Sanders Brothers* case, that standing to appeal as a "person aggrieved or whose interests are adversely affected" does not require a showing of a legal interest apart from the review provision itself, was based largely on the failure of the Commission to indicate any other substantial effect for the language quoted. The recent cases in this Court have shown, we believe, that the language does have substantial effect when limited to the vindication of legal interests.

In the first place, there are persons apart from the applicant who do have legal interests which Section 402 (b) (2) serves to protect by making available a remedy by appeal to the court of appeals. The grant of an application for renewal or modification of a license may involve a requirement that the applicant terminate or alter contractual relations with others, such as network organizations. In that event the network would undoubtedly suffer an invasion of a legal interest and could avail itself of the remedy of appeal under Section 402 (b) (2), just as it could proceed under the

Urgent Deficiencies Act, as incorporated in Section 402 (a), if the Commission's action were taken on the Commission's own motion. These avenues of review under the statute were recognized in *Columbia Broadcasting System, Inc.* v. *United States*, 316 U. S. 407, 423–424, where it was held that the existence of these remedies did not preclude an attack on the regulations in question under Section 402 (a) prior to their application in license proceedings. Other kinds of contractual arrangements might also be affected by Commission action; where the action is taken on an application by the licensee, the remedy afforded by Section 402 (b) (2) to these legally interested parties is a substantial one.

In the second place, the history of the review provision in question indicates that its purpose was not to create new rights but only to allocate review proceedings between district courts and the Court of Appeals for the District of Columbia. Prior to 1930, the Radio Act of 1927 gave to the Court of Appeals jurisdiction of appeals by an applicant or by a licensee whose license had been revoked;[19] other review proceedings were not pro-

[19] "Sec. 16. Any applicant for a construction permit, for a station license, or for the renewal or modification of an existing station license whose application is refused by the licensing authority shall have the right to appeal from said decision to the Court of Appeals of the District of Columbia; and any licensee whose license is revoked by the commission shall have the right to appeal from such decision of revocation to said Court of Appeals of the District of Columbia or to the district court of the United States in which the apparatus licensed is operated, by filing with said court, within

vided for in the statute and were thus left to the general jurisdiction of courts of equity.[20] In 1930, as a result of this Court's decision in *Federal Radio Comm'n* v. *General Electric Co.*, 281 U. S. 464, Section 16 was amended. The primary purpose of the amendment was to change the character of the appeal under Section 16 from an administrative to a judicial proceeding. See *Federal Radio Comm'n* v. *Nelson Bros. Co.*, 289 U. S. 266, 275. As amended, Section 16 unified the review procedure by requiring all appeals from Commission action granting, renewing, revoking, modifying, or suspending a license to be brought in the Court of Appeals. It was provided that appeals could be taken (1) by an applicant whose application was refused, (2) by a licensee whose license was revoked, modified or suspended, and (3) "by any other person, firm, or corporation aggrieved or whose interests are adversely affected by any decision of the commission granting or refusing any such application or by any decision of the commission revoking, modifying, or suspending an existing station license".[21] Nowhere in the debates

twenty days after the decision complained of is effective, notice in writing of said appeal and of the reasons therefor." (44 Stat. 1162, 1169.) District Courts shared the statutory jurisdiction in cases of revocation, it will be observed.

[20] For extra-statutory suits, see *Hoover* v. *Intercity Radio Co.*, 286 Fed. 1003 (App. D. C., 1923) (mandamus, prior to 1927 Act, to compel renewal); *Saltzman* v. *Stromberg-Carlson Mfg. Co.*, 46 F. (2d) 612 (App. D. C., 1931) (enjoining change in petitioner's frequency).

[21] Act of July 1, 1930, c. 788, 46 Stat. 844.

or committee reports was it suggested that the third category was intended to embrace a broader group than could theretofore have brought suit in equity in the district courts.[22] Indeed in view of the primary concern of Congress at this juncture to avoid the constitutional difficulties disclosed by the decision in the *General Electric* case, *supra*, it is hardly likely that further constitutional problems would have been introduced by authorizing appeals on the part of persons having an interest which would have been insufficient theretofore.

Finally, the Communications Act of 1934 made a further change in the allocation of jurisdiction. Section 402 once more divided jurisdiction between the district courts and the Court of Appeals; this division was based on considerations of convenience to litigants, being dependent on whether the proceeding had been instituted by an applicant or licensee or by the Commission. In the former event, appeal was to the Court of Appeals under Section 402 (b); in the latter event, it was to the district courts under the Urgent Deficiencies Act. This allocation of jurisdiction is explained in *Columbia Broadcasting System, Inc.* v. *Federal Communications Commission*, 316 U. S. [redacted], and *Scripps Howard Radio, Inc.* v. *Federal Communications Commission*, 316 U. S. 4. The effect is that all appeals growing out of decisions in

[22] See 72 Cong. Rec. 9521, 11529, 11553, 11749, 11881; also H. Rep. 1665 and S. Rep. 1105, 71st Cong.

proceedings brought by applicants or licensees must be taken to the Court of Appeals, whether by the applicant or licensee or any other party "aggrieved or whose interests are adversely affected." In other cases all appeals must be taken to the district courts, whether by licensees or persons aggrieved.

This legislative history strongly indicates, it is submitted, that the nature of the appealable interest required under Section 402 (b) (2) is no different from that required under the Urgent Deficiencies Act. Indeed, the same action of the Commission is reviewable in one or the other forum depending on how the proceedings were instituted. This was pointed out in the *Scripps Howard* case, *supra*.[23] It is clear that under the Urgent Deficiencies Act an order may be attacked only by a

[23] "* * * But while the two sections route appeals to different courts, the differentiation was in large measure the product of Congressional solicitude for the convenience of litigants. It had no relation to the scope of the judicial function which the courts were called upon to perform. For example, if the Commission on its own motion modifies a station license, review is had under § 402 (a) in the appropriate district court. However, if it grants an application for modification of license, an appeal lies under § 402 (b) to the Court of Appeals for the District of Columbia. Both cases give rise to the same kind of issues on appeal. Both orders are equally susceptible of being stayed on appeal. As the legislative history of the Act plainly shows, Congress provided the two roads to judicial review only to save a licensee the inconvenience of litigating an appeal in Washington in situations where the Commission's order arose out of a proceeding not instituted by the licensee."

person having a legal interest, or, as it was put in the *Columbia Broadcasting* case, *supra*, by one having "a cause of action in equity." See also *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125, 132, 136. Some affirmative showing should be made, we believe, that the two sections were meant to prescribe different requisites for appealable interest before that conclusion is finally accepted by the Court. Otherwise the incongruity results that, for example, respondent's right to attack the modification of the license of WHDH turns on whether the modification was ordered in a proceeding begun by WHDH or by the Commission on its own motion. This result should be avoided, particularly in view of the history of the legislative provisions and the meaning which Section 402 (b) (2) carries when it is interpreted as we suggest.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the decree of the court below should be reversed.

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APPENDIX

Communications Act of 1934:

SECTION 301. It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any Territory or possession of the United States or in the District of Columbia to another place in the same Territory, possession, or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or

with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States; or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.

* * * * * *

SEC. 303. Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

(a) Classify radio stations;

(b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;

(c) Assign bands of frequencies to the various classes of stations, and assign frequencies for each individual station and determine the power which each station shall use and the time during which it may operate;

(d) Determine the location of classes of stations or individual stations;

(e) Regulate the kind of apparatus to be used with respect to its external effects and the purity and sharpness of the emissions from each station and from the apparatus therein;

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act: *Provided, however,* That changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, after a public hearing, the

Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this Act will be more fully complied with;

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

(h) Have authority to establish areas or zones to be served by any station;

* * * * *

SEC. 304. No station license shall be granted by the Commission until the applicant therefor shall have signed a waiver of any claim to the use of any particular frequency or of the ether as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise.

* * * * *

SEC. 307. (a) The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act.

(b) In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

* * * * *

(d) No license granted for the operation of a broadcasting station shall be for a

longer term than three years and no license so granted for any other class of station shall be for a longer term than five years, and any license granted may be revoked as hereinafter provided. Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses and not to exceed five years in the case of other licenses, but action of the Commission with reference to the granting of such application for the renewal of a license shall be limited to and governed by the same considerations and practice which affect the granting of original applications.

* * * * *

SEC. 308. (a) The Commission may grant licenses, renewal of licenses, and modification of licenses only upon written application therefor received by it; * * *

* * * * * * *

(b) All such applications shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee fur-

ther written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee under oath or affirmation.

* * * * *

SEC. 309. (a) If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the Commission upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe.

(b) Such station licenses as the Commission may grant shall be in such general form as it may prescribe, but each license shall contain, in addition to other provisions, a statement of the following conditions to which such license shall be subject:

(1) The station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized therein.

(2) Neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of this Act.

(3) Every license issued under this Act shall be subject in terms to the right of use or control conferred by section 606 hereof.

* * * * * *

SEC. 312. (a) Any station license may be revoked for false statements either in the application or in the statement of fact which may be required by section 308 hereof, or because of conditions revealed by such statements of fact as may be required from time to time which would warrant the Commission in refusing to grant a license on an original application, or for failure to operate substantially as set forth in the license, or for violation of or failure to observe any of the restrictions and conditions of this Act or of any regulation of the Commission authorized by this Act or by a treaty ratified by the United States: *Provided, however,* That no such order of revocation shall take effect until fifteen days' notice in writing thereof, stating the cause for the proposed revocation, has been given to the licensee. Such licensee may make written application to the Commission at any time within said fifteen days for a hearing upon such order, and upon the filing of such written application said order of revocation shall stand suspended until the conclusion of the hearing conducted under such rules as the Commission may prescribe. Upon the conclusion of said hearing the Commission may affirm, modify, or revoke said order of revocation.

(b) Any station license hereafter granted under the provisions of this Act or the construction permit required hereby and hereafter issued, may be modified by the Commission either for a limited time or for the duration of the term thereof, if in the

judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this Act or of any treaty ratified by the United States will be more fully complied with: *Provided, however,* That no such order of modification shall become final until the holder of such outstanding license or permit shall have been notified in writing of the proposed action and the grounds or reasons therefor and shall have been given reasonable opportunity to show cause why such an order of modification should not issue.

* * * * *

SEC. 402. * * * (b) An appeal may be taken, in the manner hereinafter provided, from decisions of the Commission to the Court of Appeals of the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, whose application is refused by the Commission.

(2) By any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application.

* * * * *

SECTION 501. Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this Act prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this Act required to be done, or willfully and knowingly causes or suffers such omission

or failure, shall, upon conviction thereof, be punished for such offense, for which no penalty (other than a forfeiture) is provided herein, by a fine of not more than $10,000 or by imprisonment for a term of not more than two years, or both.

SEC. 502. Any person who willfully and knowingly violates any rule, regulation, restriction, or condition made or imposed by the Commission under authority of this Act, or any rule, regulation, restriction, or condition made or imposed by any international radio or wire communications treaty or convention, or regulations annexed thereto, to which the United States is or may hereafter become a party, shall, in addition to any other penalties provided by law, be punished, upon conviction thereof, by a fine of not more than $500 for each and every day during which such offense occurs.

Rules and Regulations of Federal Communications Commission:

SEC. 1.102. *Intervention.*—Petitions for intervention must set forth the grounds of the proposed intervention, the position and interest of the petitioner in the proceeding, the facts on which the petitioner bases his claim that his intervention will be in the public interest, and must be subscribed or verified in accordance with section 1.122. The granting of a petition to intervene shall have the effect of permitting intervention before the Commission but shall not be considered as any recognition of any legal or equitable right or interest in the proceeding. The granting of such petition shall not have the effect of changing or enlarging the issues which shall be those specified in the Commission's notice of

hearing unless on motion the Commission shall amend the same.

* * * * *

SEC. 1.195. *Communications relating to applications.*—There will be maintained in the office of the secretary of the Commission a record of all communications received by the Commission relating to the merits of any application pending before the Commission requesting the granting, renewal, modification, or revocation of any license or construction permit, certificate of convenience and necessity, or rate schedule. Such record shall show the name and address of the person making the statement and the substance of such statement. When the date of hearing has been set, if the matter is designated for hearing, the secretary shall notify all persons shown by the records to have communicated with the Commission regarding the merits of such matter in order that such persons will have an opportunity to appear and give evidence at such hearing: *Provided,* That in the case of communications bearing more than one signature, notice shall be given to the person first signing unless the communication clearly indicates that such notice should be sent to someone other than such person.

No such person shall be precluded from giving any relevant material and competent testimony at such hearing because he lacks a sufficient interest to justify his intervention as a party in the matter.

No such communication will be considered by the Commission in determining the merits of any such matter nor shall any such communication be considered by any examiner unless it has been introduced into evidence at the hearing and appears as a

part of the record. The admissibility of any such communication or the secretary's record of any such communication shall be governed by the applicable rules of evidence, and no such communication shall be admissible on the basis of a stipulation unless Commission's counsel as well as counsel for all of the parties shall join in such stipulation.

Such communications, however, may be considered by the Commission if circumstances warrant in deciding whether or not a matter shall be set down for hearing in cases where in the absence of such communication no hearing would be required by the Commission.

* * * * *

SEC. 3.21. *Three classes of standard broadcast channels.*—(a) *Clear channel.*—A "clear channel" is one on which the dominant station or stations render service over wide areas and which are cleared of objectionable interference within their primary service areas and over all or a substantial portion of their secondary service areas.

(b) *Regional channel.*—A "regional channel" is one on which several stations may operate with powers not in excess of 5 kilowatts. The primary service area of a station operating on any such channel may be limited, as a consequence of interference, to a given field intensity contour.

(c) *Local channel.*—A "local channel" is one on which several stations may operate with powers not in excess of 250 watts. The primary service area of a station operating on any such channel may be limited, as a consequence of interference, to a given field intensity contour.

SEC. 3.22. *Classes and power of standard broadcast stations.*—(a) *Class I station.*—A "class I station" is a dominant station operating on a clear channel and designed to render primary and secondary service over an extended area and at relatively long distances. Its primary service area is free from objectionable interference from other stations on the same and adjacent channels, and its secondary service area free from interference, except from stations on the adjacent channel, and from stations on the same channel in accordance with the channel designation in section 3.25 or in accordance with the "Engineering Standards of Allocation." The operating power shall be not less than 10 kilowatts nor more than 50 kilowatts. (Also see section 3.25 (a) for further power limitation.)

(b) *Class II station.*—A "class II station" is a secondary station which operates on a clear channel (see section 3.25) and is designed to render service over a primary service area which is limited by and subject to such interference as may be received from class I stations. A station of this class shall operate with power not less than 0.25 kilowatts nor more than 50 kilowatts. Whenever necessary, a class II station shall use a directional antenna or other means to avoid interference with class I stations and with other class II stations, in accordance with the Engineering Standards of Allocation.

(c) *Class III station.*—A "class III station" is a station which operates on a regional channel and is designed to render service primarily to a metropolitan district and the rural area contiguous thereto. Class III stations are subdivided into two classes:

(1) *Class III–A station.*—A "class III–A station" is a class III station which operates with power not less than 1 kilowatt nor more than 5 kilowatts, and the service area of which is subject to interference in accordance with the Engineering Standards of Allocation.

(2) *Class III–B station.*—A "class III–B station" is a class III station which operates with a power not less than 0.5 kilowatt nor more than 1 kilowatt night and 5 kilowatts daytime, and the service area of which is subject to interference in accordance with the Engineering Standards of Allocation.

(d) *Class IV station.*—A "class IV station" is a station operating on a local channel and designed to render service primarily to a city or town and the suburban and rural areas contiguous thereto. The power of a station of this class shall not be less than 0.1 kilowatt nor more than 0.25 kilowatt, and its service area is subject to interference in accordance with the Engineering Standards of Allocation.

* * * * *

SEC. 3.25. *Clear channels: Class I and II stations.*—The frequencies in the following tabulation are designated as clear channels and assigned for use by the classes of stations are given:

(a) To each of the channels below there will be assigned one class I station and there may be assigned one or more class II stations operating limited time or daytime only: * * * The power of the class I stations on these channels shall not be less than 50 kilowatts.

(b) To each of the channels below there may be assigned class I and class II stations: * * *

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